No. 14893

IN THE

United States
Court of Appeals
For the Ninth Circuit

GUENITH OPAL BEEDY AND CYNTHIA GUEN BEEDY, BY HER NEXT FRIEND, GUENITH OPAL BEEDY,

Appellants.

VS.

THE WASHINGTON WATER POWER CO., A CORPORATION,

Appellee.

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

THOMAS B. PAYNE
Residence: Wallace, Idaho.

GLENN A. COUGHLAN
327 Idaho Building
Boise, Idaho.

Attorneys for Appellants.

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STATEMENT OF CASE

Guenith Opal Beedy and Cynthia Guen Beedy, hereinafter referred to as Appellants, surviving wife and child respectively of George D. Beedy, hereinafter referred to as Deceased, brought this action against the Appellee, The Washington Water Power

Company, hereinafter referred to as The Power Company, to recover damages for the death of their husband and father, alleging that he met his death as a result of the negligence of The Power Company, which was the direct proximate cause of his death (R 3-5). The Power Company then filed a Motion to Strike the last part of Paragraph VI of Appellants' complaint (R 6), filed a Motion for More Definite Statement as to Paragraph VI (R 7) and in addition, filed a Motion to Dismiss (R 8). The Motions were orally argued before the Court and the Motion to Strike and for More Definite Statement were denied (R 22) and the Motion to Dismiss was taken under advisement and later denied by order of the Court after submission of briefs and further oral argument (R 22-23).

The Power Company thereupon filed its answer admitting that it was a Washington Corporation authorized to do business in the State of Idaho and that the controversy exceeded the sum of $3,000.00 exclusive of interest and costs; admitted it was engaged in the transportation, delivery and sale of electricity and that Deceased was an employee of the Lewis Construction Company of Great Falls, Montana, hereinafter referred to as the Contractor, who had contracted to change the wires, insulators and cross-arms on electrical transmission line for The Power Company; The Power Company denied any negligence on its part and denied that the Appellants suffered any damage.

The Power Company set up as affirmative defenses, that it was the employer of the Deceased; that Appel-

lants' suit was barred under the Workmen's Compensation Act of the State of Idaho; that Deceased was contributorily negligent; and that Deceased had assumed the risk (R 24-26).

After the issues were joined, the matter was set down for trial and due to a death occurring in one of the appellants' attorneys' families the day before the trial, the matter was continued over the term (R 27). Then on or about July 1, 1955, The Power Company filed a Motion for Summary Judgment supported by affidavits (R 27-81). The appellants filed Cross-Motions for Summary Judgment supported by affidavits (R 82-90) and after depositions were published the Motions were heard before Honorable William J. Healey, acting as District Judge in Boise, Idaho (R 91).

The Acting District Court by Memorandum Decision filed August 15, 1955, granted the Power Company's Motion and directed that judgment be entered accordingly (R 91). On August 26, 1955, Judgment for the Power Company was filed (R 92).

On September 8, 1955, Appellants filed Notice of Appeal (R 93) and Designation of Contents of Record on Appeal and thereafter within the required time filed cost bond.

JURISDICTION

Jurisdiction of the District Court is based upon diversity of citizenship, the Appellants being citizens of the State of Texas and The Power Company being a citizen of the State of Washington (R 3) and the

amount in controversy exceeding exclusive of interest and costs the sum of $3,000.00 (R 3). Jurisdiction of the District Court arose under Title 28, Section 1332, United States Code.

This Court has jurisdiction to review the case on appeal by reason of Title 28, Sections 1291 and 1294, United States Code, and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

This is an action for damages filed by appellants against The Power Company for the death of Deceased (R 3-5).

The Contractor and The Power Company entered into a written contract on the 27th of April, 1954, whereby the said Contractor agreed to replace conductors on the electrical transmission line owned by The Power Company between its substation at Government Gulch to its substation at Burke, Idaho (R 30-36, 99, 100). Pursuant to said contract the Contractor entered upon the work as provided for in the contract (R 100, 125, 161). On July 11, 1954, at a place on the above described transmission line approximately two miles northeast of Wallace, Idaho, the Deceased while in the course of his employment with the Contractor of sagging a new line just installed across a canyon over a 13,000 volt line owned by The Power Company, was electrocuted when the transmission line being sagged came into contact with the 13,000 volt line below it (R 126).

That between the 5th day of May, 1954, and the 11th day of July, 1954, when the fatal accident occurred, there were at least seven occasions when the transmission line being strung by the Contractor fell into trees, upon the ground, or into energized wires. Direct knowledge of four of these occurrences were admitted by The Power Company (R 162-169). On one of the occasions men were burned with the electrical energy of which fact The Power Company had notice and knowledge (R 164) and on the same occasion a fire was started as a result of the line being strung falling into energized wires (R 165). The Power Company had notice of the occurrences by virtue of the fact that they had an inspector upon the job daily, a Mr. Sam Hammer, (R 161), and an engineer, a Mr. Glen George, who was frequently inspecting the line with Mr. Hammer and was advised of the occurrences (R 167).

Two days prior to the 11th of July, 1954, Mr. Ed Raunig, Contractor's Superintendent, requested The Power Company to cut off the power on the 13,000 volt line running up Nine Mile Gulch over which they were to string the new line (R 104, 109). The Power Company refused to de-energize this line (R 80), as a result of which when the new line was being sagged over it, it fell into the energized line below, resulting in the electrocution of Deceased George D. Beedy (R 126-107).

SPECIFICATIONS OF ERROR

I

The Acting District Court erred in holding and in entering its Memorandum decision of August 15, 1955.

II

The Acting District Court erred in holding that The Power Company was entitled to a Summary Judgment as a matter of law.

III

The District Court erred in concluding that there is no controversial question of fact to be submitted for trial by the Court.

IV

The Acting District Court erred in entering Judgment for The Power Company.

V

The District Court erred in denying Appellants the right to trial by jury of the issues of fact set forth in their complaint.

VI

The District Court erred in considering issues of fact improperly raised by The Power Company in its Motion for Summary Judgment and self-serving affidavits attempting to state that it was in the business of repairing and constructing power lines.

VII

The evidence is wholly insufficient in any of the foregoing conclusions to support the judgment entered herein.

VIII

The Acting District Court erred in entering his Memorandum decision and Judgment thereby overruling the order of the District Judge dated April 6, 1955, which had become the law of the case.

IX

The District Court erred in holding that Power Company was the employer of the Deceased under the Idaho Workmen's Compensation Law so as to preclude a common law action by his wife and child.

X

The District Court erred in failing to find that The Power Company was negligent and as a direct result of said negligence the Deceased was killed.

XI

The District Court erred in not entering Summary Judgment for the Appellants.

STATEMENT OF ISSUES

1. Was The Power Company a third party under the Idaho Workmen's Compensation Law so as to allow a common law action for Deceased's wrongful death?

2. Did the Acting District Judge reverse the law of the case as established by the District Judge in his order of April 6, 1955?

3. Were there issues of fact presented which should have been submitted to a jury for determination?

4. Were the Appellants entitled to Summary Judgment in their favor?

5. Do the pleadings and evidence submitted support the Judgment of the Court?

ARGUMENT

I.

(Errors I, II, III, IV, V, VII)

Following the filing of Appellants' complaint in this action, The Power Company by its Motion to Dismiss (R 8) raised the issue, to-wit: Was Deceased an employee of The Power Company under the Idaho Workmen's Compensation Law so as to preclude a common law action for damages? Or stated another way, was The Power Company a third party who could be sued for negligently causing the death of the Deceased?

The Power Company contended that it was the employer of the Deceased under Idaho Code, Section 72-1010, and therefore Workmen's Compensation benefits was the exclusive remedy of Appellants. Appellants' position is that The Power Company was a third party against whom an action could be brought

pursuant to Idaho Code, Section 72-204. The matter was fully briefed and argued to the District Court who held by its Order of April 6, 1955, that the tests as to whether or not The Power Company was the Deceased's employer could only be determined on presentation of the case on its merits (R 22-23). The Power Company then by Motion for Summary Judgment raised the identical issue heretofore decided by the District Court. The Motion was heard by the Acting District Judge who by memorandum decision, without stating any reasons therefore, granted The Power Company's Motion. This action of the Acting District Court was error since it reversed the decision of the District Judge who had already decided this matter by order which became the law of the case and was not subject to change by the Acting District Judge.

The rule is fundamental that when one judge makes an order in a case it thereupon becomes the law of the case and should not be disturbed by another judge of the same court sitting in the same case. This universal rule is discussed in Commercial Union of America, Inc., v. Anglo-South American Bank, Ltd., 10 F. (2d.) 937 CCA (2), a case directly in point where it was held,

> "Where District Judge denied Motion to dismiss complaint, his decision was the law of the case as established in District Court, and should have been so treated by any other judge sitting in same case in that court; hence latter order of different judge dismissing complaint was improper.

Judges of co-ordinate jurisdiction sitting in the same court and in the same case, should not overrule the decisions of each other."

To the same effect are:

Sutherland Paper Company v. Grant Paper Box Co., et al 9 FRD 422;

North American Phillips Company, Inc., v. Brownshield, 111 F. Supp 762;

United States v. The San Leonardo 71 F. Supp 852;

Engler v. General Electric Company 32 F. Supp. 913.

The District Judge in his order of April 6, 1955 (R 22-23) set forth the genuine questions of fact which would have to be determined on trial as follows:

(1) Did the essential element of the relationship of employer and employee exist. to-wit, the right of control? and,

(2) Did the work being done pertain to the business, trade or occupation of The Power Company carried on by it for pecuniary gain?

These are issues which would have to be submitted and determined upon the merits. A Summary Judgment cannot be granted where there are questions of fact for submission to the jury.

Merely because both parties moved for Summary Judgment did not change the rule that when there are questions of fact they must be submitted to the jury.

This rule is set forth in the case of Alabama Great Southern Railroad Company v. Louisville and Nashville R.R. Co., 127 F. Supp 363, where the Court said,

> "Genuine issues of material fact are not to be resolved on Motion for summary judgment, merely because both parties have moved for summary judgment."

The rule is universal that where there is an issue of fact to be tried, a motion for summary judgment cannot be granted.

Federal Practice and Procedure—(Barron & Holtzoff) Vol. 3, Page 70;

Dewey v. Clark
180 F (2) 766;

Bridgeport Brass Co. v. Bostwick Lab., Inc., et al 181 F. (2) 315;

Fredrick Hart and Co., v. Recordgraph Corporation 169 F. (2) 580;

Boerner v. United States
26 F. Supp. 769.

Summary judgment must be denied if the evidence is such that conflicting inferences could be drawn therefrom or if reasonable men might reach different conclusions.

Federal Practice and Procedure, (Barron & Holtzoff) Vol 3, Page 78.

Winter Park Telephone Co. v. Southern Bell Tel. & Tel. Co. 181 F (2) 341 (CCa 5th);

National Surety Corp. v. Allen-Codell Co., et al 5 F.R.D. 3;

Ramsouer v. Midland Valley Railroad Co. 135 F. (2) 101.

The Power Company will undoubtedly argue that they changed the situation by filing affidavits. We respectfully submit that the affidavits submitted by The Power Company are patently self serving. They contain opinions, conclusions, hearsay, and self-serving statements which are denied by the Appellants and are matters of proof for submission to a jury. As has been said, "We do not substitute trial by affidavit for trial by jury." That would be the result if the present holding in this case were allowed to stand. There was absolutely nothing new or different raised by The Power Company during the two times this matter was argued before the District Judge and the last time it was presented to the Acting District Judge.

The matter has been passed on directly by a Federal Court in the case of Tansey v. Transcontinental and Western Air, Inc., 97 F. Supp. 458, where it was held in an action for personal injuries sustained in airplane accident, Defendant's motion for summary judgment based on provisions of Missouri Workmen's Compensation Law would be overruled where there

was doubt whether Plaintiff was covered by the provisions of such law.

Not only is there doubt as to whether the provisions of the Idaho Compensation Law deny relief in the case at bar, but in addition, we have the order of the District Judge stating that facts would have to be submitted at trial on these issues, together with the Idaho decisions holding that owners in situations as in the case at bar are not employers under the Workmen's Compensation Law.

II
(ERRORS VIII AND IX)

Third Party actions are maintainable in Idaho as established by Lebak v. Nelson, 62 Idaho 96, 107 P (2) 1054, holding,

> "The acceptance of Workmen's Compensation for death of employee does not preclude maintenance of action for damages against third party whose negligence allegedly caused injury or death."

> Followed by Lake v. State, 71 Idaho 107, 227 P. (2) 361:

> "The liability of the employer and surety for compensation is a separate and distinct liability from that of the third party tort-feasor for damages."

> and Hancock v. Halliday, 67 Idaho 119, 171 P. (2) 333.

The Power Company contends that it was the employer of deceased by virtue of Idaho Code, Section 72-1010:

> " 'Employer' unless otherwise stated, includes anybody of persons, corporate or unincorporated, public or private, and the legal representative of the deceased's employer. Includes the owner, or leasee of the premises. or other persons *who is virtually the proprietor or the operator of the business there carried on*, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workman there employed. If the employer is secured, it includes his surety so far as equitable."

We have italicized a portion of the statute for emphasis in order to point up the fact that The Power Company was not the employer of the deceased since it was not the proprietor of operator of the business there carried on. This position is borne out by the case of Moon v. Ervin, 64 Idaho 464, 133 P. (2) 933 where an owner had contracted with a contractor to build a house. An employee of the contractor was injured on the job. The owner was sued for compensation benefits by the injured employee of the contractor upon the theory the owner was liable under Idaho Code, Section 72-1010, as an employer. The court held that although he was the owner of the premises, he was not the employer of the injured claimant for two reasons. First the essential element of the

relationship of employer and employee, to-wit: the right of control, was not present, and second, that the owner was not the proprietor or operator of the business there being carried on, i.e., the construction of a building. In support of this holding the court cited Palmer v. J. A. Terteling & Sons, 52 Idaho 170, 16 P. (2) 221; Jones v. Packer John Mines Corp. et al, 60 Idaho 653, 95 P. (2) 572; In Re Fisk, 40 Idaho 304, 232 P. 569.

The case at bar comes within the Moon v. Ervin rule, supra, because the Contractor, the employer of the Deceased, was an independent contractor, as shown conclusively by the written contract (R 30-36). Accordingly, then, as in the Moon v. Ervin case, the element of control is not present. The Power Company had no right of control over George Beedy, the employee of the Contractor, and, secondly, as in the Moon v. Ervin case, The Power Company was the owner of the premises but was not the proprietor or operator of the business there being carried on, i.e., the rewiring of the power lines. The proprietor and operator of this business was the independent contractor, Contractor, a company specifically engaging in this type of work competitively, as distinguished from The Power Company whose business was that of manufacturing and selling electrical power. Therefore, we urge that the issue has been decided heretofore in accordance with the contention of the Appellants that The Power Company is not an employer under the Workmen's Compensation Law and the Appellants are entitled to have their claim presented to a jury.

The Power Company's contention that is was Deceased's employer is refuted by the Idaho Supreme Court in Gifford v. Nottingham, 68 Idaho 330, 193 P. (2) 831, where the City of Pocatello had contracted for sewer construction with a general contractor, Nottingham, and Gifford, an employee of a subcontractor of Nottingham was killed. Gifford's heirs instituted suit for damages. The plaintiff's contended in this case that the City (which has the same position as The Power Company here) was the employer. In answer to this the Court said:

> "While respondents argue that the City of Pocatello was the actual proprietor and therefore the employer as defined in Section 43-1806, I.C.A., (now Sec. 72-1010, Idaho Code), and that by reason thereof Nottingham is not included within the statutory definition of an employer, such a contention is directly in conflict with Moon v. Ervin, 64 Idaho 464, 133 P. (2) 933, wherein this court held that the owner of residence property, who let a contract to a contractor for the construction of a residence thereon, was not the employer of the workmen of the Contractor, within the meaning of the statute, and that further such owner was not the proprietor or operator of the business there being carried on, to-wit, the construction of the dwelling."

Appellants respectfully submit that the above language of the court destroys completely The Power Company's argument that it was the employer under the facts existing in this case.

The next case bearing on the question coming down from the Idaho court is Laub v. Meyer, Inc., 70 Idaho 224, 214 P. (2) 884, which cites both the Moon v. Ervin and the Gifford v. Nottingham cases, supra. The general rule for determining whether the status of employee exists is set forth on page 227 of the Idaho opinion as follows:

> "The general test is the *right* to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue, that gives rise to the relationship of employer and employee, and where the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer, and liable for compensation."

The preceding rule follows the first proposition of Moon v. Ervin, that the right to control must be present to establish the employer-employee relation.

It is definitely established by The Power Company's Manager, Virgil Thompson, in answer to Appellant's Interrogatory No. 7 that the Contractor was an independent contractor and that The Power Company exercised no control over Contractor's personnel, as follows:

> "The work was being done by an independent contractor who was completely responsible for methods of operation. The Company made no

safety inspections in connection with the work. Under our contract with the Lewis Construction Company we had no control over their method of operation and no supervision over the contractor's personnel." (R 17).

The Moon v. Ervin case, supra. is then followed by McGee v. Koontz, 70 Idaho 507, 223 P. (2) 686, holding that a mill owner who sold mill on conditional sales contract was not employer of the purchaser's employees, stating:

> "In order to hold one as an employer under the Workmen's Compensation Act, the owner of the premises, who is not the direct employer of the workmen employed on such premises, must be shown to be the proprietor or operator of a business carried on on such premises."

This ruling points up the distinction which the Acting District Judge did not recognize. The owner to be an employer must be shown to be *the proprietor or operator of the business carried on on such premises.*

For emphasis we reiterate. The Power Company *was not the proprietor or operator of the electrical reconductoring business being carried on on such premises.* The Contractor was such proprietor and operator and this is established by the contract between The Power Company and Contractor (R 30-36), and the admission of The Power Company that there was no control or supervision by it and that it

had nothing to do with the business there being carried on (R 17).

All through the decision runs the premise that the law shall be interpreted liberally as to injured workmen. It is even contained in the statutory law, Idaho Code, Section 73-102, providing:

> "The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws. The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice."

The injured man is entitled to both remedies of compensation and common law recovery in cases of third party tort-feasors.

> Idaho Code, Section 72-204;
>
> Department of Finance v. U.P. R.R. Co., 61 Idaho 484, 104 P. (2) 1110;
>
> Lebak v. Nelson, 62 Idaho 96, 107 P. (2) 1054;
>
> Lake v. State, 71 Idaho 107, 227 P. (2) 361.

The Idaho court in Hancock v. Halliday, Supra, page 129, holding contract physicians liable for negligent injuring of a worker as third persons had this to say:

> "Contract physicians are third persons as contemplated by Section 43-1004, I.C.A. (now Idaho

> Code, Section 72-204); to hold otherwise would be contrary to the plain wording of that section, and to this Court's fixed policy of liberal construction of the act in favor of the employee (Moon v. Ervin, et al, 64 Idaho 464, 133 P. (2d) 933; Stover v. Washington County, 63 Idaho 145, 118 P. (2d) 63) Olson v. U.P.R.R. Co. 62 Idaho 423, 112 P. (2d) 1005) and deprive appellant of property without due process of law, in violation of Art. 1, Sec. 13 of our Idaho Constitution."

To deny Guenith Beedy and the minor child, Cynthia Beedy, right to recover from The Power Company for its negligent killing of their husband and father would be in derogation of the liberal construction of the law in favor of injured workers and a deprivation of appellants' property as the court stated above. Surely it is recognized that death benefits under the compensation law are grossly inadequate to compensate for the Appellants loss. Lebak v. Nelson, Supra, page 113.

The decisions in Idaho adequately sustain Appellants' position and it is not necessary to go outside the state for authority. However, we find a recent California case which is directly in point that should be cited. McDonald v. Shell Oil Co., 275 P. (2d) 922, holds:

> "That employee of independent contractor had obtained a Workmen's Compensation award for injuries sustained on job did not preclude employee from seeking damages from contractor's

principal for negligence in maintaining defective equipment."

A recent Federal case which goes into the question very thoroughly discussing and analyzing the authorities is Sears Roebuck & Co., v. Wallace, 172 F. (2d) 802, from the Circuit Court of the Fourth Circuit. Sears Roebuck hired an independent contractor to make alterations on its warehouse building. The foreman of a gang of workmen of a subcontractor was injured and was held entitled to recover damages against Sears Roebuck. The decision states:

> "It was, therefore, held that the making of extensive alterations on the storage warehouse was not a part of the "trade, business or occupation" of a seller of merchandise leasing the warehouse for storage purposes within the Virginia Workmen's Compensation Act, so as to create compensation liability to an employee of the subcontractor sustaining injuries while making alterations and preclude a common law action by him against the seller for injuries.
>
> The defendant insists that the work upon which the plaintiff was engaged in this case was barred by the defendant's business by reason of the fact that the work was done in the building in which defendant was conducting its business and was necessary to the conduct thereof. We do not think that this reasoning can be sustained. The defendant was in the business of selling merchandise and needed the storage warehouse

to facilitate that activity; but it was not in the construction business, and when extensive alterations of the warehouse were deemed desirable, the defendant did not undertake to perform the work itself but employed a construction company to execute it. It was, therefore, free from the obligation to furnish compensation to the contractor's employees and remained liable for its torts."

The Court in its opinion cited the following opinions from other jurisdictions:

"The controlling principle, however, is well stated and illustrated in King v. Palmer, 129 (Conn.) 636, Pages 640-641; 30 A. (2d) 549, Page 552, where the Court held that a statute like Virginia's did not require the trustees of a railroad company to pay compensation to an employee of an independent contractor who had undertaken to replace the entire heating and service system of the railroad's engine house. The Court said:

We have regarded, however, the broad policy of the Workmen's Compensation Act; Bello v. Notkins 101 (Conn.) 34, 37, 124 A. 831; Massolini v. Driscoll, 114 (Conn.) 546-553, 159 A. 480; and in effect, have held that the words, 'process in the trade or business' include all those operations which enter directly into the successful performance of the commercial function of the principal employer.

> On the other hand, where the work in which the employees is engaged does not directly enter into the performance of the commercial function of the claimed principal employer, but only affords facilities for the conduct of his trade or business, we have held that the work is not a 'process' in that trade or business. This is so as regards the construction of a factory building; Bogoratt v. Pratt & Whitney Aircraft Co., 114 (Conn.) 126, 136, 157 A. 860; and the construction of a partition in a factory; Brown v. Waterbury Battery Co., 129 (Conn.) 44, 50, 26 A. (2d) 467; 150 ALR 1210."

It is clear, therefore, that The Power Company in this case cannot hide behind the Workmen's Compensation Act of the State of Idaho and avoid liability for its negligent killing of the employee of the Contractor. The construction and rewiring of power lines is not the business of The Power Company. The business of the Power Company is generating and selling electrical energy to its customers. It is not argued by The Power Company that it engages in the business of constructing power lines or rebuilding power lines for others for hire. The distinction is recognized. The Sears Roebuck Co. v. Wallace decision, supra, holding that the work to be employment of the owner must be in the *commercial function of the principal employer*, states the general rule.

The rebuilding of a power line is not the commercial business of The Power Company. It is a separate function affording only facilities for carrying on its usual business, which it contracted out independently to a company which was engaged in exactly that type of business in which The Power Company does not engage or compete in anywise commercially.

We wish to summarize briefly cases involving electric utilities directly which sustain our position.

> Where Rural Cooperative was organized to manufacture, purchase, and distribute electricity and construct buildings, transmission lines, etc., it engaged contractors to construct its primary transmission lines and most of its service connection, construction thereof was not part of cooperative's "usual trade, occupation, profession or business" within unemployment Compensation Act and hence contractor's employees could not be deemed Cooperative's employees for unemployment tax purposes. *Gliddon Rural Electric Cooperative v. Iowa Employment Security*, 20 NW (2d) 435 (Iowa);
>
> A power corporation contracted with one company to do the plumbing on an extension project at its plant, and another company for general construction work. Under the evidence, the corporation was held not the "common employer," hence could be sued as a third party tort feasor by an employee of the plumbing company doing the work. *Jones v. Florida Power Co.*, 72 So. (2d) 285.

A public highway along which poles were being erected by independent contractor for power company did not constitute "premises under company's control" within provision of Compensation Act, making Act applicable to contractor's employees while performing work on premises under principal's employers control. *Bates v. Connecticut Power Co.*, 33 A. (2d) 342 (Conn.).

An electric company which was subject to Workmen's Compensation Act and was engaged in work on building was not engaged in the "same or related" business with Plate Glass Company which was also subject to Workmen's Compensation Act, so as to confine electric company employee who sustained injuries while assisting Plate Glass Company employees in unloading plate glass, to damages recoverable under the Workmen's Compensation Act and deny him right to damages assessed by jury in the law action for personal injury. *Pittsburg Plate Glass Co. v. Carey*, 98 F. (2d) 533.

Iowa-Illinois Gas Electric Company v. Industrial Commission et al, 95 NE (2d) 482, has this to say on page 489:

"From the foregoing authorities and many others cited in note in 150 ALR 1214, the general trend, while not laid down with exactitude, seems to hold that where the work in which the employee is engaged does not enter into the

commercial functions of the principal employer, but only affords facilities or casual convenience for the conduct of trade or business, it cannot be held to be a part of the business."

III
(ERRORS X, XI)

The record shows: (1) That The Power Company through its agents and employees had notice of several occurrences when lines being strung fell down into energized lines and on one occasion when men were burned (R 162-169).

(2) That in spite of this knowledge, the Power Company refused the request to cut off the power so the crossing could be made in safety (R 80, 104, 109).

(3) That as a direct proximate cause of The Power Company's arbitrary refusal, deceased, George D. Beedy, was electrocuted (R 126-127).

We submit the record shows a negligent disregard for safety on the part of The Power Company who owned and controlled a dangerous agency which resulted in death of a workman. The Cross Motion for Summary Judgment of Appellants should have been granted and the matter submitted to a jury only for fixing of damages and the Acting District Court erred in failing so to do.

CONCLUSION

It is well recognized that the compensation law benefits do not in any measure adequately compensate

for the death of appellants' husband and father. The Power Company's position that because the Contractor carried compensation insurance that it should be excused for its negligent acts should not be sustained.

We submit to permit The Power Company to escape liability for its negligence on the strained construction of the statute for which it contends would be neither reasonable nor justice.

The holding of the Acting District Judge should be reversed.

Respectfully submitted,

THOMAS PAYNE
Wallace, Idaho

GLENN A. COUGHLAN
327 Idaho Bldg.,
Boise, Idaho.
Attorneys for Appellants